

APPENDIX II

“KNOW YOUR CUSTOMER” GUIDANCE

The Export Administration Regulations (EAR) require an exporter to obtain a license if the exporter “knows” that any export otherwise eligible for a license exception is destined for facilities or activities involving nuclear, chemical, or biological weapons, or missile end-use in or by a named country.

In response to many requests, BXA offers some guidance here as to how individuals and firms should act under this knowledge standard. This guidance does not change or interpret the EAR.

Decide whether there are “red flags”. Take into account any abnormal circumstances in a transaction that, indicates that the export may be destined for an inappropriate end-use, end-user or destination. Such circumstances are referred to as “red flags”. Included among examples of red flags are orders for items that are inconsistent with the needs of the purchaser, a customer declining installation and testing when included in the sales price or when normally requested, or requests for equipment configurations which are incompatible with the stated destination (e.g., 120 volts in a country with 220 volts). BXA has developed lists of such red flags that are not all-inclusive but are intended to illustrate the types of circumstances that should cause reasonable suspicion that a transaction will violate the EAR.

If there are “red flags,” inquire. If there are no “red flags” in the information that comes to your firm, you should be able to proceed with a transaction in reliance on information you have received. That is, absent “red flags” (or an express requirement in the EAR), there is no affirmative duty upon exporters to inquire, verify, or otherwise “go behind” the customer’s representations. However, when “red flags” are raised in information that comes to your firm, check out the suspicious circumstances and inquire about the end-use, end-user, or ultimate country of destination.

The duty to check out “red flags” is not confined to the use of license exceptions affected by the “know” or “reason to know” language in the EAR. Applicants for licenses are required by the Part 748 of the EAR to obtain documentary evidence concerning the transaction, and misrepresentation or concealment of material facts is prohibited, both in the licensing process and in all export control documents. You can rely upon representations from your customer and repeat them in the documents you file unless “red flags” oblige you to take verification steps.

Do not self blind. Do not cut off the flow of information that comes to your firm in the normal course of business. For example, do not instruct the sales force to tell potential customers to refrain from discussing the actual end-use, end-user, and ultimate country of destination for the

item your firm is seeking to sell. Do not put on blinders that prevent the learning of relevant information. An affirmative policy of steps to avoid “bad” information would not insulate a company from liability, and it would usually be considered an aggravating factor in an enforcement proceeding.

Employees need to know how to handle “red flags”. Knowledge possessed by an employee of a company can be imputed to a firm so as to make it liable for a violation. This makes it important for firms to establish clear policies and effective compliance procedures to ensure that such knowledge about transactions can be evaluated by responsible senior officials. Failure to do so could be regarded as a form of self blinding.

Reevaluate all the information after inquiry. The purpose of this inquiry and reevaluation is to determine whether the “red flags” can be explained or justified. If they can, you may proceed with the transaction. If the “red flags” cannot be explained or justified and you proceed, you run the risk of having had “knowledge” that would make your action a violation of the EAR.

Refrain from the transaction or advise BXA and wait. If you continue to have reasons for concern after your inquiry, then you should either refrain from the transaction or submit all the relevant information to BXA in the form of an application for a license or in such other manner as BXA may advise.

Industry has an important role to play in preventing exports and reexport contrary to the national security and foreign policy interests of the United States. BXA will continue to work in partnership with industry to make this front line of defense effective, while minimizing the regulatory burden on exporters. Your comments and questions are always welcome, *Write to: “Know your Customer Guidance,” P.O. Box 273, Washington DC 20044.*